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ATTORNEYS FOR PETITIONER
CHEVRON U.S.A. INC.

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In Re: SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD REVISED CLEANUP AND ABATEMENT ORDER REGARDING CHEVRON SERVICE STATION NO. 9-3417, 32001 CAMINO CAPISTRANO, SAN JUAN CAPISTRANO, CALIFORNIA	No. CHEVRON'S PETITION FOR REVIEW OF REVISED CLEANUP AND ABATEMENT ORDER NO. R9-2009-0124; AND REQUEST FOR STAY [T0605902379:bpulver]

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATE WATER BOARD ORDERS AND DECISIONS

OTHER AUTHORITIES

This Petition for Review ("Petition") and Request for Stay are submitted to the State Water Resources Control Board ("State Board") on behalf of Petitioner Chevron U.S.A. Inc. ("Chevron") pursuant to California Water Code section 13320 and California Code of Regulations, Title 23, Sections 2050, 2050.5(d), and 2053, with respect to Revised Cleanup and Abatement Order No. R9-2009-0124 ("Revised CAO"), issued by the California Regional Water Quality Control Board, San Diego Region ("Regional Board") on December 23, 2009. Chevron reserves the right to amend this Petition with further evidence, argument, and authorities as appropriate.

I. NAME AND ADDRESS OF PETITIONER

Petitioner is Chevron U.S.A. Inc. All correspondence and other written communications regarding this matter should be addressed as follows:

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II. ACTION OF THE REGIONAL BOARD BEING PETITIONED

The Regional Board's issuance of the Revised CAO is being petitioned.

III. DATE ON WHICH THE REGIONAL BOARD ACTED

The Regional Board issued the Revised CAO on December 23, 2009.

IV. STATEMENT OF THE REASONS WHY THE REVISED CAO IS IMPROPER AND HOW CHEVRON IS AGGRIEVED

The Revised CAO is improper because it requires Chevron to comply with deadlines that are impossible to achieve and to perform activities on property over which it has no control.

Accordingly, Chevron, through not fault of its own, may be assessed substantial penalties and may be subject to enforcement actions. Further, the Revised CAO is improper because it fails to name the City of San Juan Capistrano ("City") a Responsible Party despite the City's ability to obviate the conditions (either unilaterally or in cooperation with Chevron) that are exacerbating the groundwater contamination at issue. For these reasons, Chevron is aggrieved.

V. ACTIONS THE PETITIONER REQUESTS THE STATE BOARD TAKE

Chevron requests that the State Board stay the effect of the Revised CAO. Additionally, Chevron requests that the State Board amend the Revised CAO, or direct the Regional Board to amend the Revised CAO, so as to:

- Allow Chevron to implement an alternate remedial action in lieu of the Interim Remedial Action Plan ("IRAP") if the City does not grant Chevron access to its property and agree to minimum pumping requirements for Dance Hall Well by February 22, 2010;
- Condition the requirements and deadlines set forth in Directive B on: (1) whether and/or when the City grants Chevron access and agrees to minimum pumping requirements, and (2) a reasonable remedial action implementation schedule;
- Include a force majeure provision as the appropriate legal response to the City's failure to grant Chevron access to the Dance Hall Well to complete all necessary and required investigation and remedial activities; and
- Name the City as a Responsible Party.

These requests are discussed in greater detail below.

VI. EXECUTIVE SUMMARY

The Revised CAO requires Chevron to begin implementation of the IRAP (i.e., construction of the Dance Hall wellhead system) by January 29, 2010, and to certify that the system is fully operational by March 30, 2010, despite the fact that the City has yet to grant Chevron access necessary to perform this work, and may never do so. To ensure timely and effective remediation of the MTBE plume, Chevron should be allowed to proceed with

alternative remedial action if the City does not grant Chevron access to its property and agree to minimum pumping requirements for the Dance Hall Well by February 22, 2010. Permitting Chevron to pursue other remedial alternatives is mandated by California Water Code section 13360, which prohibits the Regional Board and State Board from specifying how Chevron must comply with the Revised CAO.

Next, Directive B should be revised so that its deadlines and requirements are contingent on the City granting Chevron access to its property. At present, these deadlines and requirements are unreasonable, and likely impossible to comply with, because implementation of the IRAP will take at least 7 months, and because the City has refused access, continues to refuse access, and may never grant Chevron access to its property, despite Chevron's good faith efforts. Further, Directive B as a whole is unreasonable because, by its terms, Chevron may be exposed to administrative or civil liability, through no fault of its own.

Additionally, Directive B should be revised to include a force majeure provision to address the City's unwillingness to permit Chevron access to the Dance Hall Well. Such a provision is necessary because Chevron has no control over the City's actions, and thus, should not be held liable for them.

Finally, the City should be named as a Responsible Party because it is in a unique position to remediate the MTBE plume, either unilaterally or in cooperation with Chevron. Naming the City a Responsible Party not only is permitted under California Water Code Section 13304 and the passive migration theory, but also is consistent with State and Regional Board policies, including Resolution 92-49. Further, it would serve to encourage cooperation between the City and Chevron, and thus, is in the public interest. The Regional Board staff has affirmed that the City can, and should, be named as a Responsible Party. While the Regional Board has acknowledged that it possesses this authority, it has refused to exercise it, absent the City's "unreasonable" refusal of access. It is unclear how much more unreasonably the City must act, given that it has already denied Chevron access for two years.

Considering the substantial questions of law and fact that these issues raise, the effect of the Revised CAO should be stayed pending a hearing on, and resolution of, this matter. The

issuance of a stay would not harm the public or other interested persons, but would prevent significant harm to Chevron.

VII. STATEMENT OF FACTS

A. Site History

Since 1972, the property located at 3200're don1 Camino Capistrano in San Juan Capistrano (the "Site") has been operated as a Chevron service station.[1] **Ex. 55** to Supplement to Chevron's Request for Evidentiary Hearing ("Supplement") (IRAP) at Section 2.1, p. 2. In September and December 1988, two gasoline releases from underground storage tanks ("USTs ") occurred at the Site. Id. at Section 2.2, p. 2; **Ex. 41** to Supplement (Jan. 29, 2007 Site Assessment Work Plan) at 2. After each release, the USTs were repaired. **Ex. 41** to Supplement (Jan. 29, 2007 Site Assessment Work Plan) at 2.

1. Chevron Promptly Began Site Investigation Activities

Chevron initiated site investigation and remediation activities in October 1988, after discovery of the first release. **Ex. 35** to Supplement (June 11, 1993 Remedial Action Plan ("RAP")) at 1. Between that time and 1991, Chevron upgraded the USTs; removed approximately 400 tons of hydrocarbon-bearing soil, as well as approximately 1,650 gallons of mixed gasoline and groundwater; installed 11 groundwater monitoring wells; and began routine groundwater sampling. **Ex. 55** to Supplement (IRAP) at Section 2.2, pp. 2-4; **Ex. 62** to Supplement (Feb. 17, 2009 Corrective Action Plan ("CAP")) at 12; **Ex. 41** to Supplement (Jan. 29, 2007 Site Assessment Work Plan) at 2; **Ex. 35** to Supplement (June 11, 1993 RAP) at 1.

In 1992 and 1993, Chevron conducted vacuum extraction and aquifer tests to determine whether vacuum and/or groundwater extraction were viable remedial options. **Ex. 41** to Supplement (Jan. 29, 2007 Site Assessment Work Plan) at 2. Based on the results of these tests,

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[1] The Revised CAO states that Chevron both owns and operates the service station. Rev. CAO at p. 2. However, Chevron currently only owns the service station.

Chevron installed and operated a soil vapor extraction system from approximately February to May 1996.[2] **Ex. 55** to Supplement (IRAP) at Section 2.2, p. 4; **Ex. 62** to Supplement (Feb. 17, 2009 CAP) at 12. This resulted in the removal of 979 pounds of hydrocarbons, and the reduction of total hydrocarbon concentrations in individual wells from 10,000 parts per million by volume ("ppmv") to 120 ppmv. **Ex. 55** to Supplement (IRAP) at Section 2.2, p. 4.

Following these activities, in June 1996, Chevron tested for, and detected, the presence of methyl tertiary butyl ether ("MTBE") during a quarterly groundwater monitoring event. **Ex. 55** to Supplement (IRAP) at Section 2.2, p. 3.

2. Chevron Requested Closure In 1997

Chevron requested site closure in 1997 based on data indicating that the remaining petroleum hydrocarbons did not pose a danger to public health, safety, or the environment. **Ex. 55** to Supplement (IRAP) at Section 2.2, p. 3. OCLOP denied this request, and instructed Chevron to, among other things, define the lateral and vertical extent of the MTBE plume. **Ex. 55** to Supplement (IRAP) at Section 2.2, p. 3.

3. Chevron First Learned Of The Dance Hall Well In 2006

Data collected by Chevron between 1997 and the first quarter of 2004 indicated that the MTBE plume was stable, and that MTBE concentrations were decreasing. **Exhibit 83** to Chevron's Petition (2003 Site Conceptual Mode ("SCM")); **Exhibit 84** to Chevron's Petition (1st Quarter 2004 Groundwater Monitoring Report). Data collected during the second quarter of 2005, however, indicated that the MTBE plume had begun to migrate. **Exhibit 85** to Petition (2nd Quarter 2005 Site Status Report).

Accordingly, in 2005, Chevron submitted, and OCLOP approved, an Investigation Work Plan for the purpose of delineating the extent of the MTBE plume migration. **Exhibit 86** Chevron's to Petition (2005 Work Plan). As part this investigation, in 2006, Chevron learned

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[2] This work was performed pursuant to the RAP approved by OCLOP in 1994. See **Ex. 36** to Supplement (Oct. 5, 1994 RAP); **Ex. 37** to Supplement (Nov. 15, 1994 letter).

that the City had installed six groundwater recovery wells in the area – including the Dance Hall Well, located 2,000 feet down gradient of the Site – and had begun using groundwater in the aquifer as a drinking water source in late 2004.[3] **Ex. 55** to Supplement (IRAP) at Section 2.2, p. 4, and Section 2.3.1, pp. 4-5.

4. In 2007, Chevron Discovered That The City's Operation Of The Groundwater Recovery Wells Was Causing The Once Stable MTBE Plume To Migrate Towards The Well Field

Upon discovering that the City's operation of its groundwater recovery wells was causing the once stable MTBE to migrate, Chevron notified the OCLOP and the City. Id. at Section 2.2, p. 4. Chevron then performed additional investigation activities, including, but not limited to, the drilling of soil and cone penetrometer test borings, the installation of groundwater monitoring wells, and the development of a site conceptual model. **Ex. 41** to Supplement (Jan. 29, 2007 Site Assessment Work Plan) at 5; **Ex. 47** to Supplement (Dec. 18, 2007 Work Plan) at 1; **Ex. 44** to Supplement (Sept. 17, 2007 Work Plan) at 1; **Ex. 49** to Supplement (Jan. 8, 2008 Work Plan) at 1. Chevron also evaluated past and future groundwater flow rates and plume migration rates in an effort to estimate the potential of MTBE contamination impacting groundwater pumped at the Dance Hall Well. **Ex. 51** to Supplement (Jan. 16, 2008 Report of Site Assessment Activities) at 5. Data from these investigations showed that the operation of the City's groundwater recovery wells was causing the once stable MTBE plume to migrate towards the well field. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 5.

5. The Groundwater Recovery Plant

In 2004, the Groundwater Recovery Plant ("GWRP"), a San Juan Basin desalter, was

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[3] In contrast, the City had known of the proximity of the Dance Hall Well to the contamination at the Site since at least 2001, when it prepared its Drinking Water Source Protection and Assessment Report. **Ex. 39** to Supplement (Drinking Water Source Protection and Assessment Report) at LUST Sites Table. This report made clear that the City must perform groundwater monitoring on a regular basis, as the Site had the potential to threaten groundwater quality. Id. at 3 ("The groundwater sources are considered most vulnerable to the following potential contaminating sources: leaking underground fuel tanks, sewer and petroleum pipelines, storm drains, agriculture and livestock. . . . The City of San Juan Capistrano should continue water quality monitoring of the groundwater source").

completed. **Ex. 3** to Chevron's Oct. 2009 Petition (Sept. 2007 Groundwater Assessment Study, Chapter IV) at IV-11-7. The GWRP is supplied by six municipal groundwater recovery wells, including the Dance Hall Well, located in the lower part of the San Juan Basin, an area previously not used as a source of drinking water due to the water's high mineral and salt content. **Ex. 55** to Supplement (IRAP) at Section 2.3.1, pp. 4-5; **Ex. 3** to Chevron's Oct. 2009 Petition (Sept. 2007 Groundwater Assessment Study, Chapter IV) at IV-11-7. The City is currently responsible for day-to-day operations and maintenance of the GWRP. **Ex. 4** to Chevron's Oct. 2009 Petition (Nov. 17, 2008 Press Release).

6. The City Elected To Shut Down the Dance Hall Well In January 2008

In January 2008, the City discovered low levels of MTBE (ranging from 1.0 to 1.2 micrograms per liter ("µg/L")) at the Dance Hall Well. **Ex. 8** to Chevron's Oct. 2009 Petition (Feb. 4, 2008 letter). At the Water Advisory Commission ("WAC") meeting held on January 22, 2008, City staff "explained that a shut down [of the Dance Hall Well] is not required at this time since the level of MTBE is way below 13 mcg/l [the primary MCL]." **Ex. 9** to Chevron's Oct. 2009 Petition (Jan. 22, 2008 WAC Meeting Minutes) at 4 (emphasis added); **Ex. 53** to Supplement (Jan. 22, 2008 Meeting Transcript) at 5-6. Notwithstanding this, the City shut down the Dance Hall Well in late January 2008, as a "proactive measure." **Ex. 10** to Chevron's Oct. 2009 Petition (Jan. 24, 2008 Press Release) ("The amount detected in the Dance Hall Well . . . is way below levels that would pose any threat to public health; however, as a proactive measure to quell any public concern, the City has shut it off indefinitely"); **Ex. 2** to Chevron's Oct. 2009 Petition (Feb. 5, 2008 City Council Meeting Minutes) at 11 ("Although the trace amounts of MTBE detected at the [Dance Hall Well] are below the primary and secondary standards, the well[] ha[s] been shut down as a precautionary measure"); **Ex. 11** to Chevron's Oct. 2009 Petition (April 1, 2008 City Council Meeting Minutes and Transcript) at 9.

At a February 26, 2008 WAC meeting, the City's consultant stated "[t]he well could be started up today, and it could be piped into the system, and the concentrations are not such that they would exceed drinking water standards." **Ex. 12** to Chevron's Oct. 2009 Petition (Feb. 26,

2008 WAC Meeting Transcript) at 18:50; cf. In re Groundwater Cases, 154 Cal. App. 4th 659, 685 (2007) (court found that "DHS's regulations also expressly permit the continued delivery of water after detection of an MCL exceedance").

Likewise, the City's Interim Public Works Director explained that "the levels of MTBE are below the secondary standard of 5 mcg/L, and are acceptable for drinking water standards." **Ex. 13** to Chevron's Oct. 2009 Petition (Feb. 26, 2008 WAC Meeting Minutes) at 3; see also **Ex. 69** to Supplement (Apr. 21, 2009 Agenda Report) at 1. She even admitted that "we can run the wells now. . . . The water would be safe." **Ex. 12** to Chevron's Oct. 2009 Petition (Feb. 26, 2008 WAC Meeting Transcript) at 40:24 (Cindy Russell) (emphasis added); see also **Ex. 14** to Chevron's Oct. 2009 Petition (Mar. 18, 2008 City Council Meeting Transcript) at 01:27:23 (City Councilmember stated that if the level of MTBE in drinking water is "below the scientific standard of any possible danger, [he didn't] see the problem in drinking the water"). Significantly, since the January 2008 detections, MTBE levels at the Dance Hall Well have not exceeded 2.0 µg/L.[4] **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 34; **Ex. 15** to Chevron's Oct. 2009 Petition (analytical reports for well samples).

7. The City Is Well Aware Of The Repercussions Of Its Decision Not To Resume Pumping Of The Dance Hall Well

Both Chevron and the Regional Board have advised the City on numerous occasions to resume pumping of the Dance Hall Well in order to prevent the MTBE plume from migrating beyond the well. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 7; **Ex. 55** to Supplement (IRAP) at 9; **Ex. 16** to Chevron's Oct. 2009 Petition (Jan. 5, 2009 letter) at 2; **Ex. 17** to Chevron's Oct. 2009 Petition (April 23, 2009 letter) at 2; **Ex. 18** to Chevron's Oct. 2009 Petition (May 11, 2009 Response to OCLOP Review of CAP) at 2; Sept. 3, 2009 CAO at 2; Sept. 28, 2009 CAO at 2; Staff Rpt. at 3; Revised CAO at 3. Specifically, in its September 3, 2009 and

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[4] In August 2005, the City detected 3.06 µg/L of MTBE at the Dance Hall Well, which the City attributed to laboratory error. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 34; **Ex. 15** to Chevron's Petition (analytical reports for well samples).

September 28, 2009 CAOs (collectively, "the September 2009 CAOs"), the Regional Board warned:

> By not pumping, or by not allowing the Dance Hall Well to be pumped to capture and contain the MTBE plume, the City is contributing to the discharge of waste, and contributing to the migration of the MTBE plume beyond the Dance Hall Well, and threatening other water supply wells.

Sept. 3, 2009 CAO at 2; Sept. 28, 2009 CAO at 2. Similar warnings were included in the November 19, 2009 Regional Board Staff Report ("Staff Report"), as well as in the Revised CAO. See Staff Rpt. at 3 ("The City's continual operation of the downgradient municipal supply wells and non-operation of the Dance Hall well has caused or permitted or, at a minimum, threatens to cause or permit a condition of pollution or hydrocarbon plume"); see also Revised CAO at 3 ("The City, by not allowing Chevron reasonable access to the Dance Hall Well or other areas of the City's property, would be contributing to the discharge of waste, and contributing to the migration of the MTBE plume beyond the Dance Hall Well, threatening other water supply wells").

Notwithstanding these warnings, and the fact that the groundwater pumped from the Dance Hall Well meets all applicable drinking water standards (see Section 6, *supra*) the City continues to refuse to pump the Dance Hall Well. **Ex. 20** to Chevron's Oct. 2009 Petition (Oct. 23-Nov. 12, 2009 The Capistrano Dispatch article).

8. The OCLOP Accepted Chevron's IRAP

On February 4, 2008, the OCLOP directed Chevron to submit an IRAP within 45 days of Chevron's receipt of the OCLOP's letter. **Ex. 8** to Chevron's Oct. 2009 Petition (Feb. 4, 2008 letter). Subsequently, on March 12, 2008, Chevron met with the City to discuss using the Dance Hall Well to capture the plume. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 9. Chevron proposed the use of a treatment system with granulated activated carbon ("GAC") filters to remove MTBE from groundwater produced at the Dance Hall Well, and a greensand filter to remove iron from the groundwater to reduce fouling of the GAC filter. Id. Water treated by the system would be returned to the GWRP. Id. The City agreed with the wellhead treatment

conceptual design. Id.

On March 18, 2008, Chevron received approval from the City to access the Dance Hall Well to conduct an aquifer test to evaluate the effectiveness of the Dance Hall Well in capturing the MTBE plume. Id. at ¶ 10; see **Ex. 6** to Chevron's Oct. 2009 Petition (May 27, 2008 WAC Agenda Report) at 5. Using the results of the aquifer test, Chevron created a preliminary modeling report. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶¶ 10, 18. The results of the groundwater modeling indicated that in order to capture the MTBE plume, the Dance Hall Well would need to be pumped as continuously as possible (i.e., with only minimal downtime for maintenance) at a certain minimum capacity. Id. at ¶ 10.

On March 26, 2008, Chevron submitted the IRAP to the OCLOP. Id. at ¶ 11. In the IRAP, Chevron proposed to remediate the MTBE plume using a wellhead treatment system at the Dance Hall Well. **Ex. 55** to Supplement (IRAP) at Section 5.1.2, p. 28. The IRAP also proposed using a 30-day period immediately following the completion of construction to troubleshoot and startup the wellhead treatment system. Id. at Section 5.2.4, p. 33; **Ex. 21** to Chevron's Oct. 2009 Petition (Sept. 28, 2008 WAC Meeting Minutes and Transcript) at part 2, p. 8. During this time, the operating parameters would be monitored daily to optimize the treatment equipment, and the GWRP operators would be trained on the system in preparation for operating and monitoring the system on their own following the startup period. **Ex. 55** to Supplement (IRAP) at Section 5.2.4, p. 33.

On April 24, 2008, the City commented on Chevron's IRAP, yet raised no objection to the conceptual design of the Dance Hall Well wellhead treatment system. **Ex. 56** to Supplement (Apr. 24, 2008 letter); **Ex. 19** to Chevron's Oct. 2009 Petition (May 6, 2008 City Council Meeting Transcript) at 57:30. On May 14, 2008, the OCLOP accepted Chevron's IRAP. **Ex. 22** to Chevron's Oct. 2009 Petition (May 14, 2008 letter).

9. Chevron Has Attempted To Implement The IRAP

In the months following the OCLOP's acceptance of the IRAP, the City's actions led Chevron to believe that the City agreed with Chevron's design for the wellhead treatment system at the Dance Hall Well. Notably, in August 2008, the Chevron submitted a Preliminary Design

Report regarding the wellhead treatment system to the City for its review and comment. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 15; **Ex. 23** to Chevron's Oct. 2009 Petition (Aug. 27, 2008 e-mail). On October 3, 2008, Chevron received and subsequently addressed the City's comments. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 17. On October 14, 2008, Chevron presented the Preliminary Modeling Report to the City and the OCLOP. Id. at ¶ 18.

On October 30, 2008, Chevron completed the 60% design and submitted it to the City for review and comment. Id. at ¶ 20; **Ex. 24** to Chevron's Oct. 2009 Petition (Oct. 30, 2008 letter); **Ex. 25** to Chevron's Oct. 2009 Petition (Oct. 7, 2008 City Council Meeting Minutes and Transcript) at 9:32. The next day, October 31, 2008, the City provided Chevron with a Draft Notice of Exemption from the California Environmental Quality Act ("CEQA"), which indicated that the City concurred with the wellhead treatment system design and the urgency in getting the system implemented by February 2009. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 21; **Ex. 26** to Chevron's Oct. 2009 Petition (Oct. 31, 2008 e-mail).

Notwithstanding this, a month later the City raised questions about Chevron's preliminary groundwater model. See, e.g., **Ex. 60** to Supplement (Nov. 24, 2008 letter). Chevron responded to the City's questions and comments by letter dated January 6, 2009, and subsequently, met with the City to discuss the installation of the wellhead treatment system. **Ex. 61** to Supplement (Jan. 6, 2009 response); **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.). During this meeting, held on January 14, 2009, the City asserted several times that "the **only** obstacle" to the City allowing Chevron to install the Dance Hall Well wellhead treatment system was the City having Chevron's preliminary groundwater model. Id.; To overcome this obstacle, on February 20, 2009, the parties entered into a Cooperation and Non-Disclosure Agreement, under which Geoscience Support Services, Inc. (the "City's Modeler") was given the source files necessary to review and assess Chevron's preliminary groundwater model. **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.).

While discussing the preliminary groundwater model with the City, in December 2008, Chevron progressed to a 100% design, and began to procure equipment and engage contractors in preparation for construction in order to meet the impending February 2009 implementation

date.[5] **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 22. Chevron took these actions based on discussions with, and input from, the City. Id. Accordingly, as planned, in February 2009, Chevron was ready to start construction of the wellhead treatment system. Id. at ¶ 24; **Ex. 27** to Chevron's Oct. 2009 Petition (July 22, 2008 WAC Meeting Minutes and Transcript) at 4. However, Chevron was unable to start construction because the City refused to grant Chevron access to the Dance Hall Well. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 24; **Ex. 28** to Chevron's Oct. 2009 Petition (Aug. 5, 2008 City Council Meeting Minutes and Transcript) at 23.[6]

In denying access, the City backtracked on its January 14, 2009 position, claiming that "[t]he key issue for the City is the level of MtBE's [sic] in our well water."[7] **Ex. 87** to Chevron's Petition (Feb. 4, 2009 e-mails). In other words, despite the fact that the parties overcame "the **only** obstacle" a year ago, the City has yet to allow Chevron to install the Dance Hall wellhead treatment system. **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.). ¶ 7. Accordingly, Chevron's subcontractors remain on hold, the greensand filter remains in storage, and the necessary geotechnical testing remains incomplete. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 24.[8]

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[5] Confirmatory geotechnical work was to be completed before the construction of pilings and foundations. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 22.

[6] At this time, the City's attorney provided the City's own design criteria for the GAC vessels. **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 23. Further engineering comments were not provided until six months later (i.e., on August 21, 2009), when the City's attorney verbally indicated to Chevron that the entire design would have to be re-done at Chevron's expense. Id. at ¶ 27.

[7] Contrary to the City's position, the Regional Board staff has pointed out that even without the implementation of the IRAP, "[g]roundwater extracted from the Dance Hall well could be used for municipal water supply. . . . At no time [since August 2005] has the MTBE concentration exceeded either the Primary (Health Risk) Maximum Contaminate Level (MCL) of 13 micrograms per liter (ug/l) or the Secondary (Taste and Odor Threshold) MCL of 5 ug/l. The distribution of water with MTBE concentrations less than the Secondary MCL would be acceptable by State standards. Prior to distribution water from the GWRP wells are mixed and treated using a greensand filter and reverse osmosis. The mixing of non-impacted water and the use of reverse osmosis treatment would further remove MTBE from the water supply." Staff Rpt. at Sec. B, p. 4.

[8] For a more detailed description of problems Chevron has encountered in implementing the IRAP, please see Chevron's October 12, 2009 letter to the Regional Board, attached as **Ex. 75** to Supplement.

10. The City Has Objected To Chevron's Corrective Action Plan ("CAP")

In February 2009, Chevron submitted to the OCLOP a CAP that affirmed the use of the Dance Hall Well wellhead treatment system as the most cost-effective remediation approach for the cleanup of the MTBE plume. **Ex. 62** to Supplement (Feb. 17, 2009 CAP). However, it also evaluated alternative remediation methods to address the OCLOP's concern that the City would not grant Chevron the access needed to construct the proposed wellhead treatment system in a timely manner.[9] See id.; **Ex. 59** to Supplement (Nov. 17, 2008 letter); **Ex. 67** to Supplement (Mar. 31, 2009 Work Plan) at 5.

Subsequently, on February 26, 2009, the Orange County Health Care Agency issued a notice of Chevron's proposed corrective action, inviting any requests for a public meeting within 30 days of the notice. **Ex. 63** to Supplement (Feb. 26, 2009 Notice); see also **Ex. 65** to Supplement (Mar. 19, 2009 email). In response to this notice, on March 17, 2009, the City sent the OCLOP a protest letter. **Ex. 64** to Supplement (Mar. 17, 2009 letter). On April 6, 2009, the Regional Board responded to the City's protest letter to correct inaccuracies contained in the letter, including to clarify that the Regional Board has not established cleanup levels for the MTBE plume. **Ex. 68** to Supplement (Apr. 6, 2009 letter) at 1. Chevron submitted a similar letter on April 23, 2009. **Ex. 17** to Chevron's Oct. 2009 Petition (Apr. 23, 2009 letter) at 1.

11. The City Continues To Prohibit Chevron's Access To The Dance Hall Well

Despite Chevron's best and good faith efforts, the City has unreasonably refused, and continues to refuse, Chevron access to the Dance Hall Well. This is clear from the City's refusal to sign an agreement relating solely to access, and its continued creation of "new" technical issues as excuses to block Chevron's access to the Dance Hall Well.

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[9] The February 2009 CAP also proposed air sparging/soil vapor extraction to remediate soil contamination on and offsite. **Ex. 67** to Supplement (Mar. 31, 2009 Work Plan) at 5. Chevron is implementing the CAP in accordance with a timeline submitted to the OCLOP on May 29, 2009. **Ex. 70** to Supplement (May 29, 2009 Schedule and Timeline for Corrective Action).

a. The City Has Refused to Sign An Access Agreement

First, the City has unreasonably denied access by refusing enter into an agreement relating solely to access. On September 15, 2009, Chevron's counsel sent to the City's counsel a letter attaching a draft access agreement regarding Chevron's access to the Dance Hall Well, the GWRP, and related City property for the construction and installation of the Dance Hall wellhead treatment system. **Ex. 72** to Supplement (Sept. 15, 2009 letter). While the release and indemnity provisions in the draft agreement were substantially similar to those in prior agreements entered into by the City and Chevron (**Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 29), the City's counsel refused to sign or comment on Chevron's draft. **Ex. 73** to Supplement (Sept. 25, 2009 letter). Instead, the City's counsel sent Chevron an entirely new agreement that required Chevron to: (1) reimburse the City for alleged past and unspecified future damages prior to granting access, and (2) completely re-design the wellhead treatment system. **Ex. 73** to Supplement (Sept. 25, 2009 letter) at 1.

On September 25, 2009, Chevron's counsel replied by urging the City to put other obstacles to the side and to focus on the construction of the wellhead treatment system in compliance with the CAO. Id. Additionally, Chevron proposed that Chevron's and the City's technical people meet to discuss the City's plans for the GWRP modification and to determine whether the parties can implement Chevron's agency-approved IRAP. Id. at 2.

The City's counsel sent Chevron a response on September 29, 2009, explaining, in relevant part, that the City would not sign Chevron's proposed access agreement because the release provision was too broad. **Ex. 74** to Supplement (Sept. 29, 2009 letter) at 1. The City did not respond to Chevron's proposal to have a technical meeting. Id.

On October 16, 2009, Chevron's counsel replied to the City's concerns regarding the release provision (and even offered to delete the release and indemnity provisions from the agreement) **Ex. 76** to Supplement (Oct. 16, 2009 letter). In its reply, Chevron again proposed a meeting between Chevron's and the City's technical people. Id.

Subsequently, in December 2009, Chevron again sent the City an access agreement to

sign, after the City stated that it was willing to do so during a meeting on December 21, 2009, which was attended by the Regional Board, Chevron, and the City. **Ex. 88** to Chevron's Petition (Dec. 23, 2009 e-mail); see also **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.); However, to date, the City still has failed to sign, or even respond to, the access agreement. **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.).

b. The City Continues To Create "New" Technical Issues As Excuses To Block Chevron's Access To The Dance Hall Well

The City has also unreasonably denied access by continuing to raise new technical issues as excuses to block Chevron's access to the Dance Hall Well. On October 29, 2009, the City's and Chevron's technical representatives met, along with the Regional Board, to discuss the City's plans for the GWRP modification. **Ex. 80** to Supplement (Nov. 6, 2009 letter); see also **Ex. 100** to Chevron's Petition (Dec. 18, 2009 letter). Most, if not all, of the technical issues concerning implementation of the Dance Hall Well wellhead treatment system were resolved at this meeting. Id. For example, the parties agreed to: (1) a design flow rate of 1,000 gallons per minute ("gpm") (compared to the original flow rate of 900 gpm), (2) Chevron's submission of plans to the City to screen the visual impacts of the GAC and new greensand filter with trees, fencing, grading changes, and other potential ideas, subject to the City's approval of Chevron's plans; (3) treatment of MTBE with two trains of two GAC vessels each, subject to the City's review of Chevron's design calculations; and (4) placement of four GAC vessels and a greensand filter outside of the existing GWRP, on Orange County Flood Control District ("OCFCD") property, subject to OCFCD approval of a temporary land lease. Id. at 2-3.

Based the parties' discussions, Chevron revised its Preliminary Design Report ("Revised PDR"), and submitted it for review and comment to the City on December 1, 2009. **Ex. 89** to Chevron's Petition (Dec. 1, 2009 letter). Despite requests from both the Regional Board and Chevron, the City has yet to comment on the Revised PDR. **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.) at ¶ 9. In fact, the City recently informed Chevron that the Dance Hall wellhead treatment system would have to be re-designed yet again to accommodate the

City's new desired design flow rate of 1,250 gpm. Id. This request is unreasonable, given that no substantial changes have occurred in the San Juan Basin since the City's initial well water quality assessment, which assigned a maximum long-term pumping rate of 1,000 gallons per gpm to the Dance Hall Well. See **Ex. 90** to Chevron's Petition (Capistrano Well Water Quality Analysis) at 1; **Ex. 94** to Chevron's Petition (Jan. 5, 2010 letter) **Ex. 91** to Chevron's Petition (Dance Hall Well Completion Report). Furthermore, the City's new excuse for not allowing Chevron to construct its treatment system, the supposed flow rate of 1,250 gpm, is not supported by any technical rationale. **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.) at ¶ 9. Moreover, it is unreasonable because Chevron has already spent considerable time and resources designing and procuring equipment for construction of the wellhead treatment system based on the City's prior representations and documentation stating that the pumping capacity of the Dance Hall Well was between 800 gpm and 900 gpm, with a maximum pumping rate of 1,000 gpm.[10] **Ex. 82** to Chevron's Opposition (Supp'l Molla Decl. at 22); **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.) at ¶ 10; see also **Ex. 11** to Chevron's Oct. 2009 Petition (April 1, 2008 City Council meeting minutes and transcript); **Ex. 90** to Chevron' s Petition (Capistrano Well Water Quality Analysis) at 1; **Ex. 91** to Chevron's Petition (Dance Hall Well Completion Report). Even while it was still named as a Responsible Party, the City admitted that "Chevron is correct that the city is standing in the way of [Chevron] implementing their . . . cleanup plan using one of [the] city's primary drinking water wells." **Ex. 20** to Chevron's Oct. 2009 Petition (Oct. 23-Nov. 12, 2009 The Capistrano Dispatch article).

Most recently, since the Regional Board's removal of the City as a Responsible Party on December 23, 2009, the City has indicated, both expressly and by its actions, that it does not intend to cooperate with Chevron. **Ex. 92** (Jan. 8-21, 2010 The Capistrano Dispatch article); **Ex. 93** to Chevron's Petition (Dec. 23, 2009 bi-weekly summary). For example, the City Manager

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[10] Chevron paid approximately $800,000 for the fabrication of a greensand filter for the Dance Hall Well based on the 900 gpm flow rate. **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.). This greensand filter could not be used if the flow rate was increased to 1,250 gpm. Id.

was recently quoted as saying that the removal of the City from the CAO placed remediation responsibilities "squarely on Chevron's shoulders." **Ex. 92** (Jan. 8-21, 2010 The Capistrano Dispatch article). Additionally, the City has blocked Chevron's progress by instructing the South Orange County Wastewater Authority ("SOCWA") to place Chevron's application to discharge water for remediation purposes on "hold" because of supposed "pending litigation."[11] **Ex. 93** to Chevron's Petition (Dec. 23, 2009 bi-weekly summary). Since the City is no longer a Responsible Party and, thus, currently faces no threat of liability for impeding the remediation, such actions are likely to continue. For this reason, there is a significant likelihood that Chevron will be unable to implement the IRAP in the near-term, if at all. See Section VIII.C.2-3, *infra*. Further, there is a significant likelihood that the MTBE plume will continue to travel and will affect down-gradient wells. See, e.g., Rev. CAO at 2-3.

B. PROCEDURAL HISTORY

1. The Regional Board Issued Cleanup And Abatement Orders in September 2009 That Named Both Chevron And The City As Responsible Parties

The September 2009 CAOs directed Chevron and the City to perform several investigation and remediation activities, beginning with the implementation of the IRAP by November 30, 2009. Sept. 3, 2009 CAO at 2, 22; Sept. 28, 2009 CAO at 2-3. Certification of completion of the IRAP was to be submitted by January 29, 2010. Sept. 3, 2009 CAO at 6; Sept. 28, 2009 CAO at 7.

When the Regional Board issued the September 2009 CAOs, the Regional Board knew that the activities it was requiring could not be completed unless the City agreed to provide Chevron access to its property. See Sept. 3, 2009 CAO at 2-3; Sept. 28, 2009 CAO at 2-3. For this reason (among others) it named the City a Responsible Party, stating: "The City [was] named a Responsible Party because it has contributed to the condition of nuisance and pollution by failing to pump the Dance Hall Well to control the MTBE plume, and because the City has

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[11] Chevron is not aware of any litigation concerning this matter.

the ability to obviate the condition." Sept. 3, 2009 CAO at p. 3; Sept. 28, 2009 CAO at 3; see also Sept. 3, 2009 CAO Cover Letter at 2-3 (similar). However, the September 2009 CAOs did not include a provision permitting Chevron to implement an alternative remediation action in lieu of the IRAP if the City refused to grant Chevron access to its property. Compare Sept. 3, 2009 CAO; Sept. 28, 2009 CAO at 3 with Chevron's Oct. 2009 Petition at Sec. VII.A.2, p. 15. Additionally, the September 2009 CAOs did not contain a provision specifying minimum requirements for how the City would operate the Dance Hall Well after the wellhead treatment system was installed. Compare Sept. 3, 2009 CAO at 6-7; Sept. 28, 2009 CAO at 6-7 with Chevron's Oct. 2009 Petition at Sec. VII.A.3, pp. 15-16. Finally, the September 2009 CAOs did not have a force majeure provision as the appropriate legal response to the City's failure to grant Chevron access to its property and/or to pump the Dance Hall Well upon installation of the wellhead treatment system. Compare Sept. 3, 2009 CAO; Sept. 28, 2009 CAO with Chevron's Oct. 2009 Petition at Sec. VII.A.4, pp. 15-17.

2. Both Chevron And The City Sought Review Of The Terms of The September 2009 CAOs

Following the issuance of the September 3, 2009 CAO, the City filed a Request for an Evidentiary Hearing with the Regional Board, and a Petition for Review of the CAO with the State Board. After the September 28, 2009 CAO was issued, both the City and Chevron submitted Requests for an Evidentiary Hearing with the Regional Board (the "City's Request" and "Chevron's Request," respectively), and Petitions for Review of the CAO with the State Board (respectively, the "City's Petition," and "Chevron's October 2009 Petition," SWRCB/OCC File A-2051(a)). Both parties asked that their Petitions be held in abeyance pending the Regional Board's consideration of their Requests. The State Board granted these requests for abeyance.

On November 19, 2009, the City submitted Comments for Evidentiary Hearing ("City's Comments"), and Chevron submitted an Opposition to the City's Request ("Chevron's Opposition") for consideration by the Regional Board's Executive Officer at the paper hearing. The Regional Board staff also submitted a Staff Report (the "Regional Board Staff Report") for

consideration. Following the paper hearing, on December 23, 2009, the Regional Board issued the Revised CAO, of which Chevron currently seeks review by this Petition.

a. The City's Contentions

In its Request and Petition, the City argued that it was not a Responsible Party under California Water Code Section 13304, or under the passive migration theory advanced in In re Matter of Zoecon Corporation, Order No. 86-2, 1986 WL 25502 (Cal. St. Wat. Res. Bd. 1986). The City also argued that, to the extent the Regional Board intended to suggest the City was a Responsible Party under the California Health and Safety Code Section 25323.5, the City was immune from liability for acts taken in its governmental capacity, as an innocent landowner, or by Chevron. Request at 5-6; City's Petition at 5-6. Finally, the City argued that the Regional Board lacked authority to require the City to resume pumping of the Dance Hall Well, as well as the authority to name the City a Responsible Party for failing to do so. Request at 6-8; City's Petition at 6-8.

The City's Comments did not raise any new substantive arguments relating to the September 28, 2009 CAO. See, generally, City's Comments. Instead, the City protested that the paper hearing itself "violate[d] the due process rights of the City of San Juan Capistrano to defend its position." City's Comments at 2-3.

b. Chevron's Request and Petition

Like the present Petition, Chevron's Request and October 2009 Petition requested that: (1) Chevron should be allowed to implement alternative remedial action; (2) Directive B's requirements and deadlines should be conditioned on the City granting Chevron access to its property; (3) minimum operating requirements should be set for the Dance Hall Well; and (4) a force majeure provision should be added to address any future failure of the City to permit Chevron access to the Dance Hall Well. See Chevron's Request [at 2]; Chevron's Oct. 2009 Petition [at 11-12]. Additionally, Chevron's Request and October 2009 Petition asked that the replacement water provision be removed, the City be responsible for submitting the operations and maintenance plan ("O&M Plan") for the wellhead treatment system, and that such submission not be due until 30 days after completion of the shakedown period. See Chevron's

Request [at 2]; Chevron's Oct. 2009 Petition [at 12].

c. Chevron's Opposition to the City's Request

Chevron opposed the City's Request on a number of grounds. First, Chevron argued that the City was appropriately named a Responsible Party under California Water Code section 13304 and the passive migration theory, as set forth in State Board decisions, as well as state and federal case law. Opp'n at Sec. III.A, pp. 15-18. Chevron also reasoned that naming the City a Responsible Party was consistent with Regional and State Board Policies, including the State Board policy governing groundwater remediation entitled, "Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304," State Board Resolution No. 92-49 (October 2, 1996).

In addition, Chevron explained that the Regional Board had the authority to require the City to pump the Dance Hall Well, as well as the authority to name the City a Responsible Party for failing to do so. Id. at Sec. III.C, pp. 25-26. Furthermore, Chevron showed that the City's affirmative defenses to liability were unsupported by either fact or law. Id. at Sec. III.E, pp. 28-33. Finally, Chevron highlighted the many erroneous and misleading facts provided by the City relating to the effectiveness, feasibility, and cost-effectiveness of the wellhead treatment system; technical discussions between the parties; and outstanding access issues. Id. at Sec. III.F, pp. 33-40.

3. The Regional Board Issued A Staff Report For Consideration At The Evidentiary Hearing

The Regional Board staff submitted additional information for consideration at the paper hearing. See Staff Rpt. In its report, the Regional Board staff recommended that: (1) the City remain a named discharger in the CAO; (2) the CAO deadlines remain unchanged; and (3) Chevron be required to provide the City with replacement water only if the secondary MCL for MTBE is exceeded in any of the City's water supply wells.[12] Staff Rpt. at pp. 2-6.

[12] The replacement water provision in the Revised CAO is not at issue in this Petition.

a. The Regional Board Staff Recommended That The City Remain A Named Discharger

The Regional Board staff's first recommendation was based on Finding 3 of the September 2009 CAOs, which stated:

> By not pumping, or by not allowing the Dance Hall well to be pumped to capture and contain the MTBE plume, the City is contributing to the discharge of waste and a condition of nuisance because its failure to do so is contributing to the migration of the MTBE plume beyond the Dance Hall Well, and is threatening other water supply wells.

Staff Rpt. at 2. The Regional Board staff explained that Finding 3 was supported by the following facts: (1) pumping of the Dance Hall well "is needed to capture and prevent further downgradient migration of the dissolved petroleum hydrocarbon plume;" and further, "Because the Dance Hall well is not being pumped, the dissolved hydrocarbon plume is not being captured, and will be allowed to migrate downgradient towards additional municipal water supply wells" (Id. at pp. 2-3, ¶ 1); (2) the City's "continual operation of the downgradient municipal water supply wells and non-operation of the Dance Hall well has caused or permitted or, at a minimum, threatens to cause or permit a condition of pollution or nuisance by allowing continued migration of the dissolved petroleum hydrocarbon plume" (Id. at p. 3, ¶ 2); and (3) the City's "continued extraction of groundwater from municipal water supply wells CVWD-1, SJBA-2, and SJBA-4 while the Dance Hall well has been shut down has resulted in the continued downgradient migration of MTBE. Notably, the Regional Board staff found that "[e]ven without the implementation of the IRA proposed by Chevron, the City has the means and ability to prevent continued migration of the MTBE plume by continued pumping of the Dance Hall well." Id. at 4 (emphasis added).

Consistent with the City's own admission that it shut down the Dance Hall well as a "precautionary measure" (**Ex. 2** to Chevron's Oct. 2009 Petition (Feb. 5, 2008 City Council Meeting Minutes) at 11), the Regional Board staff found:

> Groundwater extracted from the Dance Hall well could be used for municipal water supply. . . . . At no time [since August 2005] has the MTBE concentration exceeded either the Primary (Health Risk) Maximum Contaminate Level (MCL) of 13 micrograms per liter (ug/l) or the Secondary (Taste and Odor Threshold) MCL of 5 ug/l. The distribution of water with MTBE concentrations less than the

> Secondary MCL would be acceptable by State standards. Prior to distribution water from the GWRP wells are mixed and treated using a greensand filter and reverse osmosis. The mixing of non-impacted water and the use of reverse osmosis treatment would further remove MTBE from the water supply.

Id. at p. 4.

In sum, the Regional Board staff urged that the City should be named a Responsible Party "because it has contributed to the condition of nuisance and pollution by: (1) failing to pump the Dance Hall Well to control the MTBE plume; and (2) continuing to pump supply wells downgradient from the Dance Hall well and the leading edge of the contamination plume." Id. at pp.4-5. As the Regional Board staff noted, "The City clearly has the ability to obviate these conditions." Id. at p. 5. Thus, the City should be named a Responsible Party.

b. The Regional Board Staff Recommended Not Changing The CAO Due Dates To Ensure Compliance By Both Chevron And The City

To support its second recommendation, the Regional Board staff stated, "Aggressive compliance dates are needed to ensure that the Dischargers take all necessary actions to restore the beneficial uses of groundwater as soon as possible." Staff Rpt. at 5. Failure to meet the due dates may result in the issuance of a Notice of Violation ("NOV"). The Regional Board staff explained that an NOV "provides added incentive for the Dischargers to achieve compliance with the Order." Id. The Regional Board staff also justified its recommendation on the following basis:

> Maintaining the due dates for implementation of the IRA provides added incentive for Chevron and the City to execute an access agreement. Implementation of the IRA has been delayed due to the inability of Chevron and the City to execute an access agreement.

Id. at p. 5. However, these incentives do not exist if the City is not a Responsible Party. Instead, Chevron – as the sole Responsible Party subject to the requirements of the Revised CAO – unfairly suffers the consequences of the City refusing to allow Chevron access to implement the IRAP. As a result, the City should be named as a Responsible Party.

4. The Regional Board's Executive Officer Issued A Revised CAO On December 23, 2009

On December 23, 2009, the Regional Board issued a Revised CAO, which reflected the

Executive Officer's assessment of the evidence submitted by the City and Chevron for the November 19, 2009 paper hearing. Cover Ltr. Transmitting the Rev. CAO at 1. The Revised CAO stated that Executive Officer made the following amendments to the September 28, 2009 CAO:

> (1) remove[d] the City as a Responsible Party but [found] that the City may be added as a Responsible Party if the City unreasonably denies access to Chevron; (2) change[d] the Replacement Water provision to allow the Regional Board to require Chevron to provide replacement water to the City; and (3) move[d] the 2009-2010 compliance due dates back two months.

Rev. CAO at 6.

By this Petition, Chevron seeks review and revision of the Revised CAO in the manner set forth in Section V, for the reasons set forth in Section VIII, below.

VIII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES

A. The Revised CAO Should Be Stayed Pending Resolution Of This Petition

Pursuant to California Code of Regulations, Title 23, Section 2053,[13] for the reasons set forth below, the State Board should stay the Revised CAO pending a hearing on, and resolution of, this Petition.

1. Chevron Will Suffer Substantial Harm

Chevron will suffer substantial harm if a stay is not granted because Chevron will be exposed to administrative and civil liability for failing to comply with the Revised CAO, even though such compliance is beyond Chevron's legal or technical control. First, the Revised CAO directs Chevron to begin implementation of the IRAP by January 29, 2010. However, Chevron still does not have the City's consent to access its property and most likely will not have such consent by January 29, 2010. As the Revised CAO recognizes, "[a]ccess to the City's property is

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[13] Section 2053 authorizes the State Board to stay an action of a regional board upon evidence of: (1) substantial harm to petitioner or the public interest if a stay is not granted, (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and (3) substantial questions of fact or law regarding the disputed action.

necessary for Chevron to capture and contain the MTBE plume." Rev. CAO at 3. Thus, Chevron legally cannot enter the City's property to begin constructing the wellhead treatment system by January 29, 2010. Also, even if Chevron did have access to the City's property, the January 29, 2010 deadline would require Chevron to condense seven months of pre-construction activities into a three month period. See Revised CAO at p. 7; **Ex. 76** to Supplement; **Ex. 94** (Jan. 5, 2010 letter). This is a technically impossible feat.[14] See Revised CAO at p. 7; **Ex. 76** to Supplement; **Ex. 94** (Jan. 5, 2010 letter); see also Sections VIII.C.2, *infra*. Consequently, because Chevron will be exposed to liability and penalties for not complying with the Revised CAO, despite the fact that compliance is outside of Chevron's control, it will suffer substantial harm.

2. Neither The Public Nor Other Interested Persons Will Suffer Harm

The public will not suffer harm, substantial or otherwise, if a stay is granted because the water from the Dance Hall Well does not contain MTBE in excess of the primary or secondary MCLs, and is considered safe to drink under state and federal law. See **Ex. 15** to Chevron's Oct. 2009 Petition (analytical reports for well samples); **Ex. 82** to Supplement (Supp'l Molla Decl.); see also Section VII.A.6, *supra*. Moreover, the City will not suffer harm because it may resume, and has in fact been urged to resume, pumping of the Dance Hall Well to supply its GWRP prior to the construction of the wellhead treatment system. See Rev. CAO at pp. 6-8; see also Sept. 3, 2009 CAO at 2-3; September 28, 2009 CAO at 2-3; Staff Rpt. at 2-5. The City has acknowledged that the trace amounts of MTBE detected in the Dance Hall Well are below the primary and secondary MCLs and are acceptable under drinking water standards, yet it continues to refuse to resume pumping of the Dance Hall Well for policy reasons unrelated to public safety. See, e.g., **Ex. 13** to Chevron's Oct. 2009 Petition (Feb. 26, 2008 WAC Meeting minutes) at 3; **Ex. 69** to Supplement (Apr. 21, 2009 Agenda Report); **Ex. 10** to Chevron's Oct. 2009

[14] This would be true, even if Chevron had been granted access to the City's property on or before the issuance of the Revised CAO. **Ex. 76** to Supplement; **Ex. 94** (Jan. 5, 2010 letter).

Petition (Jan. 24, 2008 press release) ("The amount detected in the dance hall well . . . is **way below** levels that would pose any threat to public health; however, as a **proactive measure to quell any public concern**, the City has shut it off indefinitely") (emphasis added). The City's fear of public perception by no means constitutes substantial harm that would militate against a stay.

3. The Petition Raises Substantial Questions of Law and Fact

This Petition raises substantial questions of law and fact with regard to whether the Revised CAO: (1) should permit alternative remedial action; (2) sets forth infeasible and/or unreasonable requirements and deadlines; and (3) should name the City a Responsible Party. Each of these issues is discussed in greater detail below.

B. The Revised CAO Should Be Amended to Allow Chevron To Implement Alternative Remedial Action

Chevron should be allowed to implement alternative remedial action if the City does not provide Chevron access to its property and agree to minimum pumping requirements for the Dance Hall Well by February 22, 2010. Permitting such action not only is necessary to ensure that remediation efforts proceed, but also is required under California Water Code section 13360.

1. The IRAP Cannot Be Implemented Unless And Until The City Provides Chevron Access

It is undisputed that Chevron cannot implement the IRAP, and thus cannot comply with the Revised CAO, unless and until it is granted access to the City's property. See Rev. CAO at 3 ("[a]ccess to the City's property is necessary for Chevron to capture and contain the MTBE plume"); see also id. at 6-8; Sept. 3, 2009 CAO at 2-3; September 28, 2009 CAO at 2-3; Staff Rpt. at 2-5. As the Revised CAO recognizes, "The City has denied Chevron access to the City's property, including the Dance Hall Well. Therefore Chevron has been unable to implement the Interim Remedial Action described in the March 26, 2008 Interim Remedial Action Plan (IRAP)." Rev. CAO at 2. The Regional Board staff has also acknowledged this fact and that implementation of the IRAP has already "been delayed due to the inability of Chevron and the City to execute an access agreement." See Staff Rpt. at p. 5.

As shown above, Chevron has made considerable efforts to obtain access from the City

and to begin implementation of the IRAP. For example, Chevron has tried several times to enter into an access agreement with the City (see Section VII.A.11.a, *supra*), has met with the City on a number of occasions to discuss the City's technical concerns (see Section VII.A.11.b, *supra*), and has substantially revised its design of the proposed wellhead treatment system to accommodate the City's recent decision to increase the pumping rate of the Dance Hall Well (see Section id., *supra*). Nonetheless, the City continues to refuse to enter into an access agreement with Chevron, and continues to create new obstacles in the form of technical issues in an effort to delay implementation of the IRAP. See **Ex. 101** to Chevron's 2009 Petition (Jan. 22, 2010 Molla Decl.) at ¶ 11. These actions suggest that the City may never grant Chevron access to its property for the purpose of implementing the IRAP.

Perhaps recognizing this fact, the Revised CAO directs Chevron to submit an O&M plan that includes include information about "**what access is necessary for an alternative plan that excludes the use of the City's wells.**" Rev. CAO at 7. Significantly, however, the Revised CAO does not permit Chevron to proceed with alternative remedial action if the City does not grant access. Accordingly, Chevron may be unfairly liable for severe penalties, and/or subject to enforcement action, for non-compliance through no fault of its own.

2. Alternative Remedial Action Should Be Permitted Because The City Has No Obligation To Operate The Dance Hall Well In A Manner That Will Ensure Capture Of The MTBE Plume

Additionally, the Revised CAO should permit Chevron to implement alternative remedial action because the IRAP is likely to prove ineffective without specific and enforceable Dance Hall Well pumping requirements. This is because the availability of a wellhead treatment system does not in and of itself capture and remediate the MTBE plume; the City – which owns the well, operates the GWRP, and will operate the wellhead treatment system as an integral part of the GWRP – must actually pump water from the Dance Hall Well and process it through the wellhead treatment system for capture and remediation to occur. Cf. Friends of Santa Clara River v. Castaic Lake Water Agency, 123 Cal. App. 4th 1, 14 (2004) (finding description of reliability of groundwater supply in Urban Water Management Plan inadequate where it stated

availability of treatment technology, but did not discuss time for implementation). The City currently has no obligation, under the Revised CAO or otherwise, to undertake these actions.

At a minimum, the Revised CAO should require the City to operate the Dance Hall Well at a flow rate of at least 850 gpm, or at a rate the aquifer and treatment system can sustain, as continuously as possible.[15] **Ex. 1** (Molla Decl.) at ¶ 18. Nevertheless, to ensure effective remediation of the MTBE plume in the event that the City does not comply with these requirements and/or the City does not allow Chevron access to the Dance Hall Well, the Revised CAO should permit Chevron to implement alternative remedial action.

3. Section 13360 Prohibits Regional Boards From Specifying Means Of Complying With A CAO

The Revised CAO's requirement that Chevron perform wellhead treatment at the Dance Hall Well violates California Water Code section 13360. Under Section 13360, a Regional Board may not mandate the means of compliance with a CAO:

> No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.

Cal. Water Code § 13360. Simply put, "the Water Board may identify the disease and command that it be cured but not dictate the cure." Tahoe-Sierra Preservation Council v. State Water Res. Control Bd., 210 Cal. App. 3d 1421, 1438 (1989); see also In the Matter of the Petitions of the City of Pacific Grove, Order No. WQ 82-8, 11 (Cal. St. Wat. Res. Bd. 1982) (a regional board may tell a discharger "what to do," but not "how to do it"); see also **Ex. 95** to Chevron's Petition (June 29, 2007 letter) at 1.

This point was explained in a letter dated June 29, 2007, that was sent from the State Board to the City of Morgan Hill ("Morgan Hill") in relation to a site clean-up being performed

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[15] It is Chevron's understanding that the City cannot operate the Dance Hall Well when the GWRP is shut down.

by Olin Corporation. **Ex. 95** to Chevron's Petition (June 29, 2007 letter) at 1. Morgan Hill had requested that Olin Corporation be required to remediate groundwater beneath the site via a well known as the Tennant Well. The State Board explained that, pursuant to section 13360, the regional board overseeing the site could not "specify the design, location, type of construction or particular manner in which compliance may be had with the CAO." Id. (internal quotations omitted). In other words, a Responsible Party may "comply with the order in any lawful manner." Id. Accordingly, Olin could seek to remediate the site via continued operation of a wellhead treatment system, or via an alternative remedy.

Unlike in the Morgan Hill matter, here the Regional Board is specifying compliance in a particular manner in directing Chevron to implement "the Interim Remedial Action described in the March 26, 2008 IRAP." Rev. CAO at 7. As explained above, the IRAP sets forth a particular method for remediating the MTBE plume using a wellhead treatment system at the Dance Hall Well. **Ex. 55** to Supplement (IRAP) at Section 5.1.2, p. 28. Thus, the Revised CAO not only specifies the location for compliance (the Dance Hall Well), but also specifies the particular manner of compliance (constructing the Dance Hall wellhead treatment system). Furthermore, as demonstrated by Chevron's CAP, there are other available remedial alternatives.[16] Cf. Tahoe-Sierra Preservation Council, 210 Cal. App. 3d at 1438 (an order does not violate Section 13360 when the lack of available alternatives is a constraint imposed by available technology rather than an act of a regional board). Accordingly, the Revised CAO violates California Water Code section 13360.

In sum, Chevron remains committed to remediating the MTBE plume and believes that such remediation efforts should proceed in a timely manner. To that end, Chevron asks that the Revised CAO be amended to permit Chevron to implement alternative remedial action if the City fails to grant Chevron access to its property by February 22, 2010. Continuing to require

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[16] See also June 29, 2009 Work Plan (proposing a line of low-volume, downgradient extraction wells to remediate the dissolved downgradient portion of the MTBE plume); **Ex. 31** (June 30, 2009 e-mail).

Chevron to implement the Dance Hall wellhead treatment system past this date would not only waste the parties' time and resources and allow the MTBE plume to migrate further, but also violate California Water Code section 13360.

C. The Requirements And Deadlines In Directive B Should Be Contingent On The City Granting Chevron Access To Its Property For The Purpose Of Implementing The IRAP

Directive B should be revised so that its requirements and deadlines are contingent on the City granting Chevron access. As written, Directive B requires Chevron to "begin implementation (i.e., construction) of the Interim Remedial Action described in . . . the IRAP . . ." by January 29, 2010, and to certify that the system is fully operational by March 30, 2010. Rev. CAO at Directive B(1)-(3), p. 7. These deadlines are unreasonable – and impossible to meet – because implementation of the IRAP will take at least 7 months from the date that Chevron obtains access to the City's property. Additionally, the requirements are unreasonable, and may be impossible to satisfy, because they are premised on the City granting Chevron access to the City's property, despite the City's continued refusal to provide such access. Finally, Directive B as a whole is unreasonable because, by its terms, Chevron may be held liable for severe penalties and/or may be subject to enforcement actions, through no fault of Chevron.

1. The Regional Board Is Required To Set Reasonable Requirements And Compliance Deadlines

The Porter-Cologne Water Quality Control Act grants the Regional Board authority to order cleanup and abatement of discharges of waste into the waters of the state. Cal. Water Code § 13304(a). In so ordering, the Regional Board must abide by policies adopted by the State Board. Cal. Water Code § 13307(a). State Board policies address "[p]rocedures for identifying and utilizing the most cost effective methods for . . . cleaning up or abating the effects of contamination or pollution" and "policies for determining reasonable schedules for investigation and cleanup, abatement, or other remedial action at a site[,]" among others. Id.

Resolution No. 92-49 sets forth the State Board's policies applicable to cleanup and abatement orders. See **Ex. 32** (State Board Resolution No. 92-49). It requires that the Regional

Board "[c]oncur with any investigative and cleanup and abatement proposal which the discharger demonstrates and the Regional Water Board finds to have a substantial likelihood to achieve compliance, within a reasonable time frame[;]" and "determine schedules for . . . cleanup and abatement, taking into account . . . technical resources available to the discharger[.]" **Ex. 32** (State Board Resolution No. 92-49) at Sections III(A) and IV(C).

Resolution No. 92-49 also requires that the Regional Board "[i]mplement the applicable provisions of [California Code of Regulations, Title 23, Division 3,] Chapter 16 for investigations and cleanup and abatement of discharges of hazardous substances from underground storage tanks." **Ex. 32** (State Board Resolution No. 92-49). Among its provisions, Chapter 16 requires implementation of interim remedial actions, as necessary, "to abate or correct the actual or potential effects of an unauthorized release[,]" which may include "pumping and treatment of ground water to remove dissolved contaminants." Cal. Code Regs. Tit. 23, § 2722(b).

Finally, the State Board's decision in In the Matter of the Petition of BKK Corp., 1986 WL 25520, Order WQ 86-13 (State Water Res. Control Bd. August 21, 1986) requires regional boards to revise cleanup and abatement orders when the "original compliance schedule is inappropriate." See BKK Corp., 1986 WL 25520 at *8.

2. Directive B Sets An Unreasonable Implementation Schedule

As explained in a letter from Chevron to the Regional Board, dated October 12, 2009, implementation of the IRAP will take at least 7 months from the date that access is granted. See **Ex. 75** (Oct. 12, 2009 letter) at 4-5.[17] Despite Chevron's good faith efforts, the City has yet to grant Chevron access to its property for the purpose of implementing the IRAP. See Sections VII.A.3 through VII.A.11 above. Most recently, on December 21, 2009, the City's Assistant Utilities Director offered to sign an agreement permitting Chevron access to the Dance Hall Well

[17] This was reiterated in a letter to the Regional Board dated January 5, 2010. **Ex. 94** to Petition (Jan. 5, 2010 letter) at 2.

for the purpose of constructing the wellhead treatment system. **Ex. 101** to Petition (Jan. 22, 2010 Molla Decl.) at ¶11. Based on this statement, on December 23, 2009, Chevron sent the City's Utilities Director the Interim Remedial Action Access Agreement to sign. Id. at ¶ 11; **Ex. 88** to Petition (Dec. 23, 2009 e-mail). The agreement contains provisions similar to those contained in previous agreements entered into by the City and Chevron. **Ex. 101** to Petition (Jan. 22, 2010 Molla Decl.) at ¶ 11. However, to date, Chevron has not received a signed version of the agreement from the City. Id. at ¶ 11.

Thus, it is impossible for Chevron to begin construction of the Dance Hall wellhead treatment system. See **Ex. 75** to Supplement (Oct. 12, 2009 letter); see also **Ex. 94** (Jan. 5, 2010 letter). Moreover, even if Chevron had received access to the City's property before or on the day the Revised CAO was issued, Chevron still could not meet the deadlines in Directive B, given the 7 month implementation schedule.[18] Id. For this reason, Directive B is unreasonable and should be revised so that it is contingent on the City's grant of access. See Cal. Water Code § 13304(a)(4); BKK Corp., 1986 WL 25520, at *8.

3. Directive B Unreasonably Assumes The City Will Grant Chevron Access To The Dance Hall Well To Implement The IRAP

Directive B unreasonably assumes the City will grant Chevron access to its property for the purpose of implementing the IRAP. As shown below, however, the City has refused to provide Chevron such access, despite Chevron's good faith efforts. Further, the City is likely to

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[18] Impossibility or impracticability provides an excuse from performance in the analogous area of contract law. "Impossibility" means not only strict impossibility, but also impracticability because of "extreme and unreasonable difficulty, expense, injury, or loss involved." Oosten v. Hay Haulers Dairy Emp. & Helpers Union, 45 Cal. 2d 784, 788 (1956). To plead impossibility as an excuse from performance, a contractor must show that "in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive." Id. at 789. Here, Chevron has exercised "skill, diligence, and good faith" in its efforts to implement the IRAP; what has prevented Chevron from installing the wellhead treatment system has been the City's refusal to allow access to the Dance Hall Well. **Ex. 1** (Molla Decl.) at ¶¶ 22, 25-27; **Ex. 20** (Oct. 23-Nov. 12, 2009 The Capistrano Dispatch article). Thus, Directive B should be revised such that the requirement to implement the IRAP be directly conditioned upon the City's granting Chevron access to the Dance Hall Well.

continue to refuse such access because it is no longer a Responsible Party. Moreover, the City continues to raise "new" technical obstacles as excuses to block Chevron's access to the Dance Hall Well. As a result, it is currently impossible for Chevron to comply with the requirements in Directive B, and it should be revised.

a. The City Has Unreasonably Refused To Provide Chevron Access To Its Property For The Purpose Of Implementing the IRAP

Since the discovery of the groundwater wells, Chevron has made every effort to work in good faith with the City to investigate and remediate the MTBE plume emanating from the Site. See Sections VII.A.3 through VII.A.11, *supra*. In contrast, the City has created unreasonable and unnecessary impediments at nearly every step. Id.

(1) The City Has Refused To Sign An Access Agreement

To date, the City has refused, and continues to refuse, Chevron access to its property for the purpose of implementing the IRAP. See Section VII.A.11, *supra*. As discussed above, Chevron's counsel sent to the City's counsel a letter attaching a draft access agreement on September 15, 2009. **Ex. 72** to Supplement (Sept. 15, 2009 letter). The City's attorney refused to comment on and/or sign the draft. **Ex. 73** to Supplement (Sept. 25, 2009 letter). Instead, the City's counsel sent Chevron an entirely new agreement that required Chevron to: (1) re-design the wellhead treatment system; and (2) reimburse the City for alleged past and unspecified future damages prior to granting access. **Ex. 73** to Supplement (Sept. 25, 2009 letter) at 1.

On September 25, 2009, Chevron's counsel replied by urging the City to put other obstacles to the side and to focus on the construction of the wellhead treatment system in compliance with the CAO. Id. Chevron also proposed that Chevron's and the City's technical people meet to discuss the City's plans for the GWRP modification and to determine whether the parties can implement Chevron's agency-approved IRAP. Id. at 2. While the City ultimately agreed to meet to discuss the City's technical concerns, it refused to sign the access agreement, arguing that it contains an overly broad release provision. **Ex. 80** to Supplement (Nov. 6, 2009 letter); **Ex. 74** to Supplement (Sept. 29, 2009 letter) at 1. The same release provision, however,

was included in two other agreements entered into by the City and Chevron.[19] **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 29.

Most recently, at a December 21, 2009 meeting between Chevron, the City, and the Regional Board, a City representative offered to sign the access agreement. **Ex. 101** (Jan. 22, 2010 Molla Decl.) Accordingly, Chevron promptly sent him the access agreement to sign. **Ex. 101** (Jan. 22, 2010 Molla Decl.); **Ex. 88** (Dec. 23, 2009 e-mail). However, a month later, Chevron still has yet to receive a signed version of the access agreement from the City (despite several requests) and has no indication that the City will sign the agreement any time soon. **Ex. 101** (Jan. 22, 2010 Molla Decl.). Accordingly, Directive B should be revised so that its requirements and deadlines are contingent on when and if the City grants Chevron access.

(2) The City Continues To Raise New Technical Issues As Obstacles

In addition to refusing to enter into an access agreement, the City continues to raise new technical obstacles as excuses to block Chevron's access to the Dance Hall Well. Recently, the City demanded that Chevron revise its PDR to accommodate the City's plan to increase the pumping rate of the Dance Hall Well to 1,000 gallons per minute ("gpm"). **Ex. 80** to Supplement (Nov. 6, 2009 letter). Chevron complied with this request, and submitted a Revised PDR to the City for review and comment on December 1, 2009. **Ex. 89** to Chevron's Petition (Dec. 1, 2009 letter). Despite requests by both the Regional Board and Chevron to do so, the City has failed to comment on the Revised PDR. See **Ex. 96** to Chevron's Petition (Dec. 17-18, 2009 e-mails); **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.) at ¶ 9. Instead, it informed Chevron that the PDR would have to be revised **again** to accommodate the City's new desired design flow rate of 1,250 gpm. **Ex. 97** to Chevron's Petition (Dec. 21, 2009 meeting minutes).

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[19] Chevron offered, by letter dated October 16, 2009 to delete these provisions, but received no response from the City. **Ex. 76** to Supplement (Oct. 16, 2009 letter); **Ex. 82** to Supplement (Supp'l Molla Decl.) at ¶ 29.

The City's latest demand is unreasonable because no substantial changes have occurred in the San Juan Basin since the City's initial well water quality assessment, which assigned a maximum long-term pumping rate of 1,000 gallons per minute ("gpm") to the Dance Hall Well. See **Ex. 90** to Chevron's Petition (Capistrano Well Water Quality Analysis) at 1; **Ex. 94** to Chevron's Petition (Jan. 5, 2010 letter) **Ex. 91** to Chevron's Petition (Dance Hall Well Completion Report). Further, the City's request is unreasonable because Chevron has spent considerable time and resources to design and procure equipment for construction of the wellhead treatment system based on the City's prior representations that the pumping capacity of the Dance Hall Well was between 800 gpm and 900 gpm, with a maximum pumping rate of 1,000 gpm. See **Ex. 90** to Chevron's Petition (Capistrano Well Water Quality Analysis) at 1; **Ex. 94** to Chevron's Petition (Jan. 5, 2010 letter). Thus, it is evident that the City's most recent technical "issue" is merely another delay tactic. Consequently, Directive B should be revised so that its requirements and deadlines are contingent on the City granting Chevron access (if ever).

b. The City Will Likely Continue To Refuse Chevron Access Because It Is Not A Responsible Party Under The Revised CAO

Despite Chevron's concerted efforts to meet all of the City's demands, the City has refused, and continues to refuse, Chevron access to its property. See Section VII.A.11, *supra*. Such refusal is likely to continue given that, by removing the City as a Responsible Party, the Regional Board eviscerated any incentive the City may have had to cooperate with Chevron in the investigation and remediation of the MTBE plume. The City's Manager made this fact clear recently when he stated that the removal of the City from the CAO would place remediation responsibilities "squarely on Chevron's shoulders." **Ex. 92** (Jan. 8-21, 2010 The Capistrano Dispatch article). The City has also made this clear by instructing SOCWA to place Chevron's application to discharge water for remediation purposes on "hold" because of "pending litigation." See **Ex. 101** to Chevron's Petition (Jan. 22, 2010 Molla Decl.) Since the City currently faces no repercussions under the Revised CAO for impeding the remediation, it is likely to continue to obstruct Chevron's efforts to implement the IRAP and to remediate the MTBE plume.

As established above, if the City refuses to cooperate and to provide Chevron access to its property, it will be impossible for Chevron to implement the IRAP. See Revised CAO at 3; see also Staff Rpt. at 4. Thus, Directive B is unreasonable and potentially impossible for Chevron to comply with.

4. Directive B Is Unreasonable Because It Does Not Provide Chevron Recourse And/Or Immunity From Penalties Assessed As a Result Of The City's Denial Of Access

Finally, Directive B is unreasonable because it does not provide Chevron any recourse and/or immunity from penalties and enforcement actions if the City continues to refuse Chevron access to its property. Rev. CAO at Sec. 4, p. 3. Instead, the Revised CAO states that the Regional Board "will amend [the Revised CAO] to add the City as a Responsible Party if the City unreasonably denies Chevron access to the City's property for the purpose of capturing and containing the MTBE plume" (emphasis added). Rev. CAO at Sec. 4, p. 3. This statement by no means shields Chevron from severe penalties and/or enforcement actions, given that the

Regional Board may act after the deadlines set forth in Directive B, or may ultimately elect not to act. Subjecting Chevron to the threat of severe penalties and/or enforcement actions for non-compliance is unreasonable because compliance, as an initial matter, is beyond the control of Chevron. See Cal. Water Code § 13304(a)(4); BKK Corp., 1986 WL 25520, at *8. For these reasons, Directive B should be revised so that its requirements and deadlines are contingent on Chevron obtaining access to the City's property.

D. Directive B Should Be Revised To Include A Force Majeure Provision To Address The City's Unwillingness To Permit Chevron Access To The Dance Hall Well

Directive B should be revised to include a force majeure provision to address the City's unwillingness to permit Chevron access to the Dance Hall Well. Force majeure provisions are commonly used in orders issued pursuant to the Clean Water Act. See In re Lafourche Parish, 2009 WL 1359541, at ¶ 24 ("Respondent shall perform the requirements of this [Consent Agreement and Final Order] within the time limits set forth or approved or established herein, unless the performance is prevented or delayed solely by events which constitute a force majeure"); In re Center Point Dairy Limited, 2008 WL 4948554, at ¶ 46 (similar). Here, where the City has demonstrated a history of delay and non-cooperation (see, e.g., **Ex. 20** (Oct. 23-Nov. 12, 2009 The Capistrano Dispatch article)), inclusion of a force majeure provision is appropriate to protect Chevron from being held in violation of the Revised CAO for the City's actions should the City continue to deny Chevron access to the Dance Hall Well. Chevron recommends the following force majeure provision:

> The Regional Board acknowledges and agrees that implementation of the interim remedial action and other matters relating to the cleanup and abatement of the discharge depends upon the willingness of the City to cooperate with the requirements set forth in the CAO. As such, Chevron's ability to meet the deadlines set forth herein is conditioned upon the City's compliance with the CAO. To the extent that Chevron has used its best efforts to meet the deadlines and is unable to do so due to matters beyond its reasonable control, including the City's unwillingness to permit Chevron access to the Dance Hall Well, the GWRP, and related City property, the time for completion shall be extended for a period commensurate with the delay.

Ex. 1 (Molla Decl.) at ¶ 26.

Because Chevron is unable to install the wellhead treatment system at the Dance Hall

Well unless and until the City grants Chevron access, and because the City's actions are completely beyond Chevron's control, the inclusion of a force majeure provision is appropriate to protect Chevron from being held in violation of the Revised CAO for the City's actions, should the City continue to deny Chevron access to the Dance Hall Well.

E. The City Should Be Named As A Responsible Party

The State Board should name the City a Responsible Party pursuant to its authority under California Water Code section 13304 given the City's unique position to remediate the MTBE plume, either unilaterally or in cooperation with Chevron. Naming the City a Responsible Party would be consistent with State and Regional Board policies, including Resolution 92-49, and would encourage cooperation, and would be in the public interest. Further, it would be consistent with recommendations set forth in the Regional Board's Staff Report.

1. The City Is Responsible Under The California Water Code For The Continued Migration Of Contaminated Groundwater

The Regional Board has the authority to name the City as a discharger in a CAO issued under the Porter-Cologne Water Quality Control Act, California Water Code section 13000, et seq. Water Code section 13304 states that "[a]ny person . . . who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts." Cal. Water Code § 13304(a) (emphasis added). The term "discharge" has broad application in the precedential decisions of the State Board, and includes within its interpretation the ongoing movement of waste from contaminated groundwater to unpolluted groundwater.[20]

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[20] The City's Request found fault with the September 28, 2009 CAO for not explicitly alleging how the City "caused or permitted" or "threaten[ed] to cause or permit" a discharge of waste, but otherwise ignores the significance of this language. City's Req. at pp. 3-4.

See In re Zoecon Corp., Order WQ-86-2, 1986 WL 25502, *2 (Cal. St. Wat. Res. Bd. 1986) (interpreting "discharge" in context of waste discharge requirements of Water Code § 13263[a]); see also Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 1053, 1076 (2003) ("[P]assive migration of [a] contaminant from another source into . . . wells constitutes a release at the wells").

Zoecon supports the proposition that "a discharge of waste includes passive migration of waste after the initial discharge." Rev. CAO at 2, n.2. In that matter, a property owner, Zoecon Corporation ("Zoecon"), challenged its being named by a regional board as a discharger, claiming that the contaminants were unrelated to the chemicals it used in its on-site operations. The regional board had found that regardless, "Zoecon . . . has legal title to the site where the contaminants are concentrated [and thus] has certain responsibility for any investigation or remedial action." Zoecon, 1986 WL 25502 at *1. Zoecon characterized itself as the "mere landowner." Id. at *5. However, the State Water Resources Control Board ("State Board") found that to be the very role that put Zoecon "in the position of being well suited to carrying out the needed onsite cleanup." Id. The State Board stated that "[t]he petitioner has exclusive control over access to the property[; a]s such, it must share in responsibility for the clean up." Id. (emphasis added). The State Board upheld the regional board's decision to name Zoecon as a "discharger" such that it would be a responsible party for waste discharge requirements. Id. at *6.

Contrary to the City's arguments raised in its Request and Petition, Zoecon does not hold that a landowner must "own the site from which the contaminants originated" in order to be liable as a discharger based on passive migration. City Req. at 4; City's Petition at 4. In fact, the origin of the contamination was irrelevant to the State Board's holding in Zoecon; instead, the key to its decision was whether a "movement of contamination" existed at the site that comprised "a discharge to waters of the state that must be regulated." Zoecon, 1986 WL 25502 at *2. The State Board concluded that there was "an actual movement of waste from soils to ground water and from contaminated to uncontaminated ground water at the site which [was] sufficient to constitute a discharge[.]" Id. Thus, contamination need not originate from the landowners'

property; the only prerequisite for discharger liability to accrue is that the landowner causes or permits a discharge to occur. Cal. Water Code § 13304(a); Zoecon, 1986 WL 25502; see also In re the San Diego Unified Port District, 1989 WL 118194 at 3 (Port held to be a responsible party because, *inter alia*, it owned "a portion of the [contaminated] tidelands and submerged lands underlying the inland navigable waters of San Diego Bay adjacent to the 24th Street Terminal" from which the contamination originated).

Like Chevron, the Regional Board cites to California Water Code section 13304 and Zoecon in the Revised CAO in explaining that the Regional Board has the authority to name the City a Responsible Party. Rev. CAO at 2-3. The Regional Board also cites to In re Spitzer, Order No. 89-8 (St. Wat. Res. Control Bd. 1989), which holds that a property owner is ultimately responsible for its property. Id. at 3. In Spitzer, the regional board issued a CAO directing three landowners, and other parties, to investigate and remediate soil and groundwater contamination. Spitzer, Order No. 89-8, at 1-2. The landowners challenged the CAO, arguing that they should not have been named responsible parties because they "had no involvement or control over the use of the Property." Id. at 7. The State Board rejected this argument, asserting, "A long line of State Board orders have upheld Regional Board orders holding landowners responsible for cleanup of pollution on their property regardless of their involvement in the activities that initially caused the pollution." Id. Further, the State Board declared:

> A landowner is ultimately responsible for the condition of his property, even if he is not involved in day-to-day operations. If he knows of a discharge on his property and has sufficient control of the property to correct it, he should be subject to a cleanup order under Water Code Section 13304.

Id. at 8. The State Board affirmed that this rule applied as long as the contamination remained in the soil and groundwater. Id. Similarly, here the City should be named a Responsible Party because it knows of the MTBE plume on its property and has sufficient control of the property to correct it. See id.

2. Naming The City A Responsible Party Is Consistent With Regional And State Board Policies

Naming the City a Responsible Party is not only required by California Water Code

Section 13304, it is also consistent with Regional and State Board Policies.

a. Naming The City A Responsible Party Is Consistent With Resolution 92-49

Resolution No. 92-49 sets forth the State Board's policies applicable to cleanup and abatement orders. See **Ex. 32** to Chevron's Oct. 2009 Petition (Resolution No. 92-49). Resolution No. 92-49 requires the Regional Board to "apply [certain] procedures when determining whether a person shall be required . . . to clean up waste and abate the effects of a discharge or a threat of a discharge under WC Section 13304[,]" including to "[m]ake a reasonable effort to identify the **dischargers** associated with the discharge." **Ex. 32** to Chevron's Oct. 2009 Petition (Resolution No. 92-49) at Sections I and I.B (emphasis added). In identifying the dischargers, the Regional Board must "[u]se any relevant evidence, whether direct or circumstantial, including, but not limited to . . . [s]ite characteristics and location[;] [h]ydrologic and hydrogeologic information, such as differences in upgradient and downgradient water quality; [and r]efusal or failure to respond to Regional Water Board inquiries[.]" Id.

In the Revised CAO, the Regional Board states:

> The City, by not allowing Chevron reasonable access to the Dance Hall Well or other areas of the City's property, would be contributing to the discharge of waste, and contributing to the migration of the MTBE plume beyond the Dance Hall Well, threatening other water supply wells. As the owner and operator of the Dance Hall Well, the City has the ability to allow Chevron reasonable access to City property to arrest the spread of the plume and abate the condition of waste that exists in groundwater or to undertake these activities itself. In addition, the City is ultimately responsible for its property.

Revised CAO at Finding 4, p. 3. Considering these circumstances, the City is clearly discharger, and thus, naming it a Responsible Party would be consistent with Resolution 92-49.

b. Naming The City A Responsible Party Is Likely To Encourage Cooperation, And Thus, Is In The Public Interest

As discussed above, after the City was removed as a Responsible Party, the City publicly stated that the remediation burden was now on "Chevron's shoulders." **Ex. 92** (Jan. 8-21, 2010 The Capistrano Dispatch article). It then took actions to actively block Chevron's waste water

discharge application. See **Ex. 93** to Chevron's Petition (Dec. 23, 2009 bi-weekly summary). Unless the City is named a Responsible Party, and is held liable for failing to cooperate with Chevron to remediate the MTBE plume, the City is likely to continue to impede progress. For this reason, naming the City as a Responsible Party is likely to encourage such cooperation, and thus, is in the public interest.

3. The Regional Board Staff Agrees That The City Should Be Named A Responsible Party

Like Chevron, the Regional Board staff has determined that the City can and should be named a Responsible Party. Staff Rpt. at Sec. B, pp. 2-5. In the September 2009 CAOs and the Staff Report, the Regional Board stated:

> By not pumping, or by not allowing the Dance Hall well to be pumped to capture and contain the MTBE plume, the City is contributing to the discharge of waste and a condition of nuisance because its failure to do so is contributing to the migration of the MTBE plume beyond the Dance Hall Well, and threatening other water supply wells.

Sept. 3, 2009 CAO at p. 2, ¶ 3; Sept. 28, 2009 CAO at p. 2, ¶ 3; Staff Rpt. at Sec. B, p. 2. It supported this finding with the following facts: (1) pumping of the Dance Hall well "is needed to capture and prevent further downgradient migration of the dissolved petroleum hydrocarbon plume;" and further, "Because the Dance Hall well is not being pumped, the dissolved hydrocarbon plume is not being captured, and will be allowed to migrate downgradient towards additional municipal water supply wells" (Id. at pp. 2-3, ¶ 1); (2) the City's "continual operation of the downgradient municipal water supply wells and non-operation of the Dance Hall well has caused or permitted or, at a minimum, threatens to cause or permit a condition of pollution or nuisance by allowing continued migration of the dissolved petroleum hydrocarbon plume" (Id. at p. 3, ¶ 2); and (3) the City's "continued extraction of groundwater from municipal water supply wells CVWD-1, SJBA-2, and SJBA-4 while the Dance Hall well has been shut down has resulted in the continued downgradient migration of MTBE. This action by the City also is causing or permitting or, at a minimum, threatening to cause or permit a condition of pollution or

nuisance (Id. 3, ¶ 3).[21]

For the reasons above, the Regional Board named the City a Responsible Party in the September 2009 CAOs, explaining:

> Pursuant to the California Water Code, the California Health and Safety Code, and applicable law, the City is named a Responsibly Party because it has contributed to the condition of nuisance and pollution by failing to pump the Dance Hall Well to control the MTBE plume, and by failing to pumpt the Dance Hall Well to control the MTBE plume, and because the City has the ability to obviate the condition.

Sept. 3, 2009 CAO at 3; Sept. 28, 2009 CAO at 3. In the Staff Report, the Regional Board urged that this decision should stand. Staff Rpt. at 4-5. The State Board should adopt the Regional Board staff's conclusions and name the City a Responsible Party.

4. The Regional Board Agrees That It Has The Authority To Name The City A Responsible Party, But Inappropriately Refused To Exercise Such Authority

The Regional Board agrees with the Regional Board staff and Chevron that the Regional Board has the authority to name the City a Responsible Party. The Revised CAO reflects this conclusion by stating:

> The City, by not allowing Chevron reasonable access to the Dance Hall Well or other areas of the City's property, would be contributing to the discharge of waste, and contributing to the migration of the MTBE plume beyond the Dance Hall Well, threatening other water supply wells. As the owner and operator of the Dance Hall Well, the City has the ability to allow Chevron reasonable access to City property to arrest the spread of the plume and abate the condition of waste that exists in groundwater or to undertake these activities itself. In addition, the City is ultimately responsible for its property.

Revised CAO at 3. The Revised CAO, however, does not name the City as a Responsible Party. Id. at 2-3. Instead, it states:

> The Regional Board will amend this CAO to add the City as a Responsible Party if the City **unreasonably** denies Chevron access to the City's property for the purpose of capturing and containing the MTBE plume.

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[21] The Regional Board staff relied on data from groundwater monitoring well MW-16D, MW-17D, and MW-18D to support its conclusion that the City's continued pumping of municipal water supply wells CVWD-1, SJBA-2, and SJBA-4 while the Dance Hall well has been shut down has resulted in the continued downgradient migration of MTBE. Staff Rpt. at pp. 3-4, ¶¶ 3(i)-(ii).

Id. at 3 (emphasis added).

It is unclear, however, how much more unreasonably the City must act before it is named as a Responsible Party. As shown above, the City has refused, and continues to refuse, Chevron access to its property, despite Chevron's good faith efforts. Specifically, the City has refused to sign Chevron's proposed agreement based on a purportedly "overbroad" release provision, although though a similar provision was included in two other agreements entered into by the City and Chevron. See Section VIII.C.3.a, *supra*; see also Ex. 73 to Supplement (Sept. 25, 2009 letter). The City instead has insisted that Chevron sign a new agreement, under which Chevron would be required to: (1) re-design the wellhead treatment system; and (2) reimburse the City for alleged past and unspecified future damages prior to granting access. Ex. 73 to Supplement (Sept. 25, 2009 letter) at 1. This demand, and previous actions by the City, led the Regional Board staff to conclude that "[a]t least one reason for the failure to reach an agreement is the City's desire to leverage its claim of past damages in exchange for the access agreement." Staff Rpt. at p. 4, n.6.

Further, it is uncertain not only whether the Regional Board will determine if an amendment is necessary, but also when it might do so. This is manifestly unfair to Chevron because Chevron can be held liable for severe penalties and/or can be subjected to enforcement actions for failing to comply with the Revised CAO, even though such compliance can only be achieved if the City agrees to grant access to its property.

For the reasons above, the Regional Board has the authority to name the City a Responsible Party. The City has already acted unreasonably long enough, and it should not be permitted to continue to impede Chevron's remediation efforts. Moreover, Chevron should not be penalized for the City's actions or inactions. Accordingly, the State Board should name the City a Responsible Party now.

IX. CONCLUSION

The Revised CAO unreasonably requires Chevron to implement the IRAP, even though the City refuses to grant Chevron access to do so. To ensure effective remediation, the Revised CAO should be modified to permit Chevron to implement alternative remedial action if the City

does not grant access to its property, and agree to minimum pumping requirements, by February 22, 2010. Additionally, the Revised CAO should be amended so that Directive B's requirements and deadlines are conditioned on the City's grant of access, and a reasonable implementation schedule. It should also be amended to include a force majeure provision as the appropriate legal response to the City's failure to grant Chevron access. Finally, the Revised CAO should be modified to include the City as a Responsible Party given the City's unique ability to remediate the MTBE plume, either unilaterally or in cooperation with Chevron.

DATED: January 22, 2010 BINGHAM MCCUTCHEN LLP

By: _____
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